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TESTIMONY

OF

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BEFORE

THE SENATE SELECT COMMITTEE ON INTELLIGENCE

ON

S. 1721

FRIDAY, DECEMBER 11, 1987

Mr. Chairman, Members of the Committee:

I am pleased to appear before you today to discuss the constitutional issues implicated by S. 1721, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice believes that this legislation, in its present form, could seriously impair the President's ability to discharge his important constitutional responsibilities in the field of foreign relations.

Before summarizing the serious constitutional issues raised by the bill, I should like to note that the Congress and the President share a common objective in this area: an effective, responsible intelligence capability and establishment. In our view, we regret to say, the bill fails to advance this shared objective. We submit, on the other hand, that the President's procedures for approval, review, and notification of special activities, which he communicated to this Committee by his letter of August 7, 1987, respect the well-established constitutional authority of both branches. They also strengthen our intelligence capability by rationalizing the process for making decisions and reviewing policies, thereby freeing both branches to pursue the important national goal of an effective, responsible intelligence service.

S. 1721 would repeal the Hughes-Ryan Amendment, which requires Presidential approval of covert actions by the CIA. In its place, the bill would institute a new presidential approval requirement, which would become Section 503 of the National Security Act of 1947. Proposed Section 503 would require that

the President authorize all "special activities," or covert actions, conducted by any department, agency, or entity of the United States government. The Presidential approval would take the form of a "finding," which must be reduced to writing within forty-eight hours of the time that a decision regarding covert actions is made.

S. 1721 would also require that findings be in writing. In circumstances where time does not permit the preparation of a written finding prior to presidential approval, S. 1721 would require that a written finding be prepared "as soon as possible." In no event would S. 1721 permit the preparation of a written finding more than forty-eight hours after a Presidential decision had been made. The President already has adopted procedures, virtually identical to those set forth in the bill, to ensure that findings are committed to writing. Indeed, in his letter to Chairman Boren dated August 7, 1987, the President pledged that "[e]xcept in cases of extreme emergency," all national security findings will be in writing. Moreover, the President stated that if an oral directive is necessary, a finding will be "reduced to writing and signed by the President as soon as possible, but in no event more than two working days thereafter."

Our primary constitutional concern with S. 1721 arises from the requirement that absolutely every finding be reported to the congressional intelligence committees within a fixed period of time. The proposed amendment would require that notice in all cases be given within 48 hours of the time that a finding is signed.

This Administration, like prior Administrations, believes it is important to work with Congress in this area. Moreover, the President recently has reaffirmed his commitment to the current statutory scheme of prior notification and has made clear his desire and intention to cooperate with Congress in the area of foreign affairs. While cooperation is the rule, the Department believes that there may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President, under any and all circumstances, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President. As I am sure the members of the Committee are aware, issues of such constitutional gravity have implications far beyond the reporting requirements in this bill. Equally as important, such requirements raise important practical concerns about the United States' ability to operate an effective intelligence service. I am clearly not the best person to address those latter concerns.

I will not attempt to discuss all of the authorities and precedents relevant to our constitutional conclusion. Nevertheless, I do believe that it is important to discuss briefly some of the bases for our conclusion. First, of course, there is the text of the Constitution itself. Article II, section 1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of

America." This clause has long been understood to confer on the President a plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject of course to the limits set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers.

Since the beginning of the Republic it has been recognized by Presidents, Congress, and the Judiciary that the Constitution vests in the President broad and exclusive responsibilities in the field of foreign relations. This authority was first asserted by George Washington and acknowledged by the First Congress.

There have been many situations throughout our history in which a President has refused to accede to a Congressional request for information that he deems confidential. These range from President Hoover's refusal to provide the Senate Foreign Relations Committee with letters concerning negotiation of the London Treaty to President Eisenhower's refusal to turn over personnel information during Congressional investigations into the loyalty-security program. Moreover, on numerous occasions in our history, Congress itself has recognized that its power to get information from the Executive branch is not absolute, particularly when it relates to a matter within the ambit of the President's foreign affairs powers.

James Madison, while a member of the House of Representatives, defended Washington's decision to withhold from the House

information relating to the negotiation of the Jay Treaty. Madison asserted that "the Executive had a right . . . to withhold information, when . . . [he] conceived that, in relation to his own department, papers could not be safely communicated." Congressional recognition of the President's right to withhold information has continued into the twentieth century.

The federal judiciary has likewise recognized the President's important powers in the area of foreign affairs. In Curtiss-Wright, the Supreme Court drew a sharp distinction between the President's relatively limited inherent constitutional powers to act in the domestic sphere and his far-reaching discretion to act on his own constitutional authority in managing the external relations of the country. The Court emphatically declared that this discretion derives from the Constitution itself, stating that "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress."

More recently, the Supreme Court again has emphasized that the President has broad powers in the area of foreign affairs. Moreover, the Court's reasoning indicates that this power will sometimes justify withholding information from the other branches of the government. In United States v. Nixon, the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of former President Nixon's claim of an absolute privilege to maintain the confidentiality of Executive branch communications. While

rejecting his sweeping and undifferentiated claim of executive privilege as it applied to communications involving domestic affairs, the Court repeatedly stressed that military or diplomatic secrets are in a different category. The Court's opinion stated that the protection of such secrets is inextricably linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." Covert intelligence operations in foreign countries are among the most sensitive and vital aspects of the President's constitutional responsibilities in the field of foreign relations.

Presidents have been careful to consult regularly with Congress to seek support and counsel in matters of foreign affairs. Moreover, we recognize that the President's authority over foreign policy is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power.

Our view that the Constitution does not authorize these provisions of S. 1721 should not be misinterpreted as a denial that Congress has a legitimate role in the formulation of American foreign policy. But Congress in the performance of its legislative function does not require notification of virtually all intelligence activities within a fixed period of time after the President signs an order authorizing its initiation.

Even in cases in which it can be assumed that Congress has a legitimate legislative basis for the requested information, it does not follow that the President invariably should communicate findings to Congress within 48 hours of the time that they are signed. As President Tyler recognized in 1843, "[i]t cannot be that the only test is whether the information relates to a legitimate subject of [congressional] deliberation." A President is not free to communicate information to Congress if to do so would impair his ability to execute his own constitutional duties. Under some circumstances, communicating findings to Congress within 48 hours could well frustrate the President's ability to discharge those duties. For example, it was absolutely necessary that the Carter Administration withhold from Congress information relating to Canada's involvement in the smuggling of six American hostages out of Iran. According to Admiral Stansfield Turner, who was Director of the CIA at the time, Canada made withholding notification to Congress a condition of its participation. Similarly, requiring the Executive branch to disclose all information requested by the intelligence committees could, under some circumstances, prevent the President from fulfilling his constitutional duties.

In recent hearings on a House bill that would have imposed a 48 hour reporting requirement on the President, several Congressmen argued that such legislation could be justified as an exercise of Congress' power to tax and spend. Their argument was that the power to appropriate or to refuse to appropriate funds includes the lesser power to appropriate funds subject to a

condition, such as a reporting requirement. We readily acknowledge that Congress' appropriations power is exceedingly broad, and includes as a general matter the authority to attach conditions to appropriations. But it is not limitless. The fact is that Congress appropriates money for all government departments and agencies. It also appropriates all salaries for all federal employees in all three branches of government. But the fact that Congress appropriates money for the Army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress' establishment through legislation of the various executive branch departments and its appropriation of money to pay the salaries for federal officials that Congress can constitutionally condition the creation of a department or the funding of an officer's salary on being allowed to appoint the officer. Acceptance of this understanding of the appropriations power would in effect transfer to Congress all powers of all branches of government. The framers' carefully worked out scheme of separation of powers, of checks and balances, would be rendered meaningless. Accordingly, however broad the Congress' appropriations power may be, the power may not be exercised in ways that violate constitutional restrictions on its own authority or that invade the constitutional prerogatives of the other branches.

There are two other provisions of S. 1721 which raise similar constitutional problems. Proposed Section 502 would require

that intelligence agencies disclose to Congress whatever information concerning intelligence activities, other than "special activities," that Congress deems necessary to fulfill its responsibilities. Proposed Section 502 contains only one exception to its absolute disclosure requirement; the Executive branch is granted authority to protect classified information relating to sensitive intelligence sources and methods. Proposed Section 503 has a similar provision requiring the Executive branch to disclose all information concerning covert actions that is requested by the intelligence committees. Proposed Section 503, however, is not tempered by the limited exception permitting the Executive branch to protect sensitive sources and methods. These virtually absolute disclosure requirements raise much the same concern as the 48-hour notice provision. Both purport to sharply reduce, and, in the case of covert operations, completely eliminate the authority of the Executive branch to withhold from Congress information relating to the discharge of its responsibilities in the field of foreign affairs, even when the release of such information would interfere with the President's ability to fulfill his constitutional duties.

The provisions of S. 1721 requiring that the President provide all information requested by the intelligence committees raise a separate constitutional concern, which I should discuss briefly. Many of the documents retained by the intelligence agencies may constitute interagency communications. Although disclosure of these documents might not impair directly the President's authority in the area of foreign affairs, we never-

theless believe that the Executive branch may legitimately refuse to provide these documents to Congress. The Supreme Court in the Nixon case recognized that there is a "valid need for protection of communications between high government officials and those who advise and assist them." While this decision was rendered in the context of Presidential communications, the same principles would apply with respect to communications containing the policy deliberations of other executive officials. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decisions of the government.

Of course, the Executive branch will attempt to cooperate with Congress. In all but the most exigent circumstances, this cooperation will take the form of providing the information that Congress requests. We cannot agree, however, that a blanket requirement of disclosure in all cases is appropriate. The President must retain the discretion to withhold information when its disclosure would impair his ability to fulfill his own constitutional responsibilities.

In sum, then, S. 1721 raises a number of constitutional concerns. First, the requirement that the President, under all circumstances, report to Congress within 48 hours of the time that a finding is signed authorizing covert action unconstitutionally interferes with the President's foreign affairs powers. Likewise, the absolute requirement that the Executive branch provide all information requested by the intelligence committees may impede the President's ability to discharge his constitutional responsibilities in the area of foreign affairs. Moreover,

the disclosure provisions purport to prevent the President from protecting confidential executive branch deliberations. These provisions attempt by legislation to alter the Constitution's allocation of powers among the institutions of our government. This simply cannot be done by legislation, regardless of whether the Executive branch concurs in the reallocation of power.

I thank the Committee for this opportunity to discuss our constitutional concerns and would be pleased to address any questions that you may have.